United Nations **AT**

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 938

Case No. 1024: OUSTINOVITCH

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Mr. Victor Yenyi Olungu;

Whereas, on 19 June 1998, Vitali Borissovitch Oustinovitch, a former staff member of the International Civil Aviation Organization (hereinafter referred to as ICAO), filed an application, the pleas of which read as follows:

"...

The Appellant hereby wishes **first** to appeal against the decision of the Secretary General of ICAO not to follow the conclusions 8.4 and 8.5 ... of the Advisory Joint Appeals Board's (AJAB) Opinion No. 113 (...), namely to pay for the termination indemnity.

Second the Appellant appeals against the action of the Secretary General of ICAO for not continuing to search for an acceptable alternative employment. The Appellant asks for a minimum of two years salary as compensation for the missed opportunity of salary revenue.

Third the Appellant asks for $35,000.- in moral damages.

Fourth the Appellant asks that the ICAO's Administration shows documented [proof] of their seriousness to follow up conclusion 8.2 of the AJAB opinion."

Whereas the Respondent filed his answer on 15 October 1998;

Whereas, on 17 June 1999, the Applicant filed an additional document and on 12 July 1999 the Respondent commented thereon;

Whereas, on 2 August 1999, the Tribunal decided to defer consideration of the case to its autumn session;

Whereas the facts in the case are as follows:

The Applicant entered the service of ICAO on 27 April 1987, on a fixed-term contract of employment for a period of three years, at the P-3 level, as a Technical Officer, Communications, in the European and North Atlantic Office, Paris. The contract provided that "the appointment carries no expectancy of renewal upon expiry, and will terminate on its expiry date without further notice".

In a letter dated 11 December 1989, the Applicant was offered a new fixed-term contract from 27 April 1990 for a period of two years. This contract likewise contained a clause stating that the appointment carried no expectancy of renewal and would terminate on expiry without further notice; the Applicant accepted this offer on 21 December 1989.

On 3 May 1991, the Personnel Branch sent to the ICAO Representative (ICAO REP), Paris Office, Form 176 by which he was asked to indicate whether the Applicant's contract should be renewed and if so, whether this should be on a career (term appointment) or non-career basis. The ICAO REP, Paris, recommended a contract renewal but on a non-career basis; the Secretary General, ICAO, agreed with this recommendation on 12 August 1991.

The Applicant's contract of employment was further renewed by letter dated 18 March 1992 for a period of two years on a fixed-term basis from 27 April 1992. This letter also stated that the appointment carried no expectancy of renewal and would terminate on expiry without further notice. The Applicant signed this new contract on 15 April 1992.

On 4 October 1993, the ICAO REP, Paris, recommended the abolition of the post encumbered by the Applicant. The Secretary General, ICAO, approved this recommendation on 18 October 1993.

By memorandum dated 9 November 1993 to the Applicant, the Chief, Personnel Branch (C/PER), informed the Applicant as follows:

> "I must confirm the verbal information you received from ICAO REP, Paris, several months ago, that due to a reorganization in the EUR/NAT Office, the Secretary General has decided to abolish your post, PN 2920.004RP, upon the expiry of your present fixed-term appointment, i.e. as of 27 April 1994. After a thorough review of vacant posts in the Organization no suitable post commensurate with your qualifications and experience is available within ICAO so that the Secretary General will not be able to offer you acceptable alternative employment. It will therefore not be possible to offer you a renewal of your fixed-term appointment after its expiry on 26 April 1994."

In a memorandum dated 19 November 1993 to the C/PER, the Applicant drew attention to a number of personal factors, including the fact his son was a third-year student at the Sorbonne University and his school year and exams would "terminate in June with the licence diploma delivered in July 1994". He continued:

> "Taking all the above into account, as well as the requirement for continuation of the COM section activities during the 1994 summer vacation period and preparation for the Special EUR RAN Meeting (September 1994) I would like to ask you to postpone the abolishment of the post and to renew my contract for a reasonable period of time."

The C/PER replied on 17 December 1993, informing the Applicant that after a "careful review of your personal circumstances, particularly the fact that your son ... will obtain a 'Licence' degree in July 1994 and the need for the Organization to abolish your post as of 27 April 1994 upon expiry of your present fixed-term appointment, the Secretary General has decided to postpone the abolishment of your ... post by three months. Consequently, your present fixed-term appointment will be extended until 27 July 1994." The Applicant's contract of employment was accordingly extended with the remaining terms and conditions of the 18 March 1992 contract unchanged. The Applicant unconditionally accepted this extension on 14 February 1994.

On 22 June 1994, the Applicant wrote to the C/PER, as follows:

> "Having carefully read your memo[randum] of 9 November 1993 on the subject of the abolishment of the post PN 2920.004RP proposed by the Paris Office ICAO REP, ..., in June 1993, I am under the impression that a year [has] passed and a lot of important developments occurred regarding the volume of work in the COM Section in the ICAO Paris Office. I have some strong indications confirming that the argument raised by [the ICAO REP], regarding the insufficient amount of work in the COM Section, to support the abolishment of the post, was wrong.
>
> ...
>
> On the basis of the above, I fail to understand why my contract could not be renewed.
>
> Your early attention to this matter and your favourable decision would be highly appreciated."

The Acting C/PER replied on 23 June 1994, requesting the Applicant to note that the offer of extension signed by him on 15 April 1992 stated that the appointment carried no expectancy of renewal upon expiry. He further informed that a restructuring of the work of the Paris Office was found necessary "because a professional level post had to be returned to Cairo."

On 7 July 1994, the Applicant lodged an appeal with the Advisory Joint Appeals Board (AJAB). The Board adopted its report on 19 March 1998. Its findings and conclusions read, in part, as follows:

> "7. **FINDINGS OF THE BOARD**
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> ...
>
> 7.2 The Board noted the Secretary General's view, as expressed by his Representative, that the appeal was not receivable insofar as the Appellant did not respect the applicable time limits specified in the Staff Rules. The Board finds that the time limit, as expressed by the Secretary General, was based on the date of the original notification of the decision to abolish his post, 9 November 1993; whereas

the Board bases the applicability of the time limits specified in the Staff Rules to the date of the notification by A/C/PER [Acting Chief, Personnel Branch] on 24 June 1994 stating that the Appellant's appointment was abolished and could not be further extended. The Board finds that the Appellant had spent the time between the original notification and the letter from A/C/PER (between 9 November 1993 and 24 June 1994) seeking means to resolve his situation in accordance with staff rule 111.1.1, and that he submitted his intention to appeal only after having exhausted all other means at his disposal. Since the letter of intention to appeal was submitted within the specified time limits after the letter of 24 June 1994 from A/C/PER which effectively brought the informal review action to a close, the Board finds that the appeal was receivable.

...

8. CONCLUSIONS

8.1 The Board recognizes that the decision of the Secretary General to abolish a post is a discretionary one and that the Board cannot judge on the desirability or necessity of such action. Therefore, the Board cannot comment [on] the claim of the Appellant [relating to this issue] and must reject the said claim.

8.2 ... the Board finds that there is no documented evidence that an endeavour was made to find acceptable alternative employment for the Appellant, and that there is no evidence on file, nor produced at the Hearing, which would indicate that the Appellant is unsuitable to serve in the Organization. The Board accepts the claim of the Appellant ... and unanimously recommends, therefore, that the Personnel Branch be instructed to make another (documented) endeavour to find acceptable employment for the Appellant and that, if no such employment is currently available, the Appellant's name be placed on a roster for future consideration should suitable vacancies occur.

8.3 The Board is not in a position to judge whether the Appellant was a suitable candidate for any of the positions which may have been open at the time of the abolition of his post. Therefore, the Board must reject the said claim of the Appellant [relating to this issue] ...

8.4 The Board finds that, had the Appellant been accorded normal consideration vis-à-vis the awarding of a term appointment after the first two-year fixed-term appointment, the Appellant would have been eligible for termination indemnity. The fact that the Appellant was not accorded normal consideration is viewed by the Board as a failure of Personnel procedures and, therefore, it is the unanimous

recommendation of the Board that, without creating a precedent, the Appellant be awarded the termination indemnity to which he would, under normal circumstances, have been entitled, the amount to be calculated in accordance with annex V of article IX of the ICAO Service Code.

8.5 ... the only loss that the Appellant can legitimately claim is the use of the termination indemnity to which he would have been entitled had normal Personnel procedures been followed. Therefore, the Board unanimously recommends that the Appellant be awarded the interest which would have accrued on the total sum of the termination indemnity during the excessive delay of eleven months, [for administrative delays in connection with the appeal], plus any additional delay which might occur after the submission of these findings. All other claims are rejected."

On 9 April 1998, the Secretary General informed the Applicant as follows:

"...

I accept the conclusions of the Board as set out in subparagraphs 8.1, 8.2 and 8.3 of its Opinion No. 113. However, I am unable to accept the Board's conclusions as contained in subparagraphs 8.4 and 8.5 of its Opinion."

On 19 June 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant should receive a termination indemnity under staff regulation 9.9 of the ICAO Service Code, as his separation from service was due to abolition of post.

2. The Secretary General failed to find the Applicant acceptable alternative employment in accordance with staff regulation 9.4 of the ICAO Service Code.

3. The Applicant should receive moral damages for the long delays during his appeal to the AJAB (in the amount of $35,000).

Whereas the Respondent's principal contentions are:

1. The Application is not receivable as it was time-barred under the AJAB procedure (staff rule 111.1)

2. Alternatively, the non-renewal of the Applicant's contract was a lawful and proper exercise of the powers of the Respondent.

3. Termination indemnity is not payable in the case of a non-renewal of a fixed term contract.

The Tribunal, having deliberated from 4 to 19 November 1999, now pronounces the following judgement:

I. The Applicant appeals a decision of the Respondent dated 9 April 1998. That decision did not accept the AJAB recommendation in its entirety. The Respondent did not accept the AJAB's findings that there had been a failure of procedures vis-a-vis the awarding of a term appointment to the Applicant and that termination indemnity should be paid. The Applicant claims that in its decision not to renew his fixed-term appointment, the Respondent used the procedure of abolition of post and not a termination of contract. Therefore, the Applicant is claiming a termination indemnity. In addition, the Applicant claims that the non-renewal of his fixed-term appointment violated his rights and requests the Tribunal to compensate him for damages due to the mishandling of his case by the ICAO.

II. At the outset, the Tribunal must turn to the Respondent's claim that the appeal before it is time-barred. Under ICAO staff rule 111.1, a staff member who wishes to appeal a decision of the Secretary General must first address a letter to the Secretary General requesting that the decision be reviewed. Such a letter must be sent within one month of the time the staff member received notification of the decision in writing (ICAO staff rule 111.1.5). If the staff member wishes to appeal against the answer from the Secretary General,

he shall appeal in writing within two weeks of the date of receipt of the answer; if no reply is received from the Secretary General within two weeks of the date the letter was received by him, the appeal shall be submitted within the two following weeks (ICAO staff rule 111.1.6). A staff member who fails to observe these time limits loses the right to appeal, unless the delay is waived (ICAO staff rule 111.1.8).

III. On 9 November 1993, the C/PER informed the Applicant that since his post was being abolished his fixed-term contract would not be renewed and that his employment at ICAO would be terminated in April 1994. Following a memorandum by the Applicant to the C/PER in which he requested a postponement of the abolition of his post because his son was to finish university in Paris and receive a "Licence" in July, the C/PER granted him a postponement of three months. On 22 June 1994, the Applicant wrote to the C/PER asking for a reconsideration of the abolition of his post. Once this was denied on 23 June 1994, the Applicant submitted a letter of appeal dated 7 July 1994 to the AJAB.

IV. Reviewing these facts, the Tribunal considers that the Applicant was informed of the termination of his contract on 9 November 1993. In the Applicant's memorandum dated 19 November 1993, he was not contesting the Respondent's decision but rather was asking for a postponement due to personal reasons. The granting of this postponement based on purely humanitarian grounds, did not constitute a waiver of the time-limits envisaged in ICAO staff rule 111.1. Nor can such an extension be explicitly or implicitly understood from the Respondent's memorandum to the Applicant dated 23 June 1994. This response was not a new decision, but simply a reiteration of the Respondent's previous decision to terminate the Applicant's contract. (Cf. Judgement No. 552, *Szenttornyay* (1992)). The Tribunal has consistently, in its decisions, emphasized the importance of complying with the mandatory time-limits. (Cf. Judgements No. 527, *Han* (1991); No. 549, *Renninger* (1992); and No. 596, *Douville* (1993)).

V. Consequently, the Applicant's application is not receivable since it is time-barred under ICAO staff rule 111.1.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Victor YENYI OLUNGU
Member

New York, 19 November 1999

Maritza STRUYVENBERG
Executive Secretary